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Fixed Recoverable Costs – the draft rules

The draft CPR rules to extend the FRC regime, to introduce Fixed Recoverable Costs (FRC) for most claims worth up to £100,000, have now been published, with a new Intermediate Track to be created for claims worth between £25k and £100k. A FOIL Update was published on 24 April setting out the provisions in brief. This Update looks behind the headline issues to consider the detail of the proposed rules.

FOIL continues to lobby the MOJ on issues of concern. The current drafts still await ministerial sign-off with final versions expected at the end of May.

Introduction

FOIL has been a long-time supporter of Fixed Recoverable Costs: it was actively involved in the development of the FRC regime for the Low Value Protocol/Portal process back in 2007/8 and welcomed the government's commitment, in its 'Transforming our Justice System' consultation in 2016, to extend the FRC regime to "*as many civil claims as possible*". FOIL would echo Lord Justice Jackson's view on FRC: they ensure costs are proportionate and predictable and reduce the need for costs budgeting.

As always with costs issues, the devil is in the detail. Following the government's commitment to extend the FRC regime, FOIL has extensively lobbied the MOJ and the CPRC on matters of detail, to ensure the new rules work effective and deliver on the policy objectives. Whilst the existing FRC regimes have brought significant benefits in reduced costs and greater certainty, quirks of the rules and drafting issues have created problems over the years and FOIL has been keen to ensure that lessons are learnt. Some of the issues FOIL has raised have been addressed but there remain some concerns with the current draft versions.

The new rules are included in Part 26 (Case Management); Part 28 (The Fast Track and Intermediate Track); Part 36 (Offers to Settle); and Part 45 (Fixed Costs).

Part 26 – Case Management

New provisions in r.26.9 set out the scope of each Track. R.26.9(7) sets out the parameters for the new Intermediate Track:

- Claim is not suitable for the Small Claims Track or Fast Track.

- Claim is valued at less than £100k.
- Trial of no more than 3 days.
- Maximum of two expert witnesses per party.
- No more than two claimants or two defendants.
- Claim "*may be justly and proportionately managed*" under the case management provision for Intermediate Track claims in Part 28, including that the total length of all witness statements and witness summaries shall not exceed 30 pages; and no expert report exceeds 20 pages excluding photos, plans and attached academic articles. There will be new standard directions.
- "*There are no additional factors which would make the claim inappropriate for the intermediate track".* Claims meeting the Intermediate Track criteria may still be allocated to the Multi Track. Conversely, where a claim does not meet the criteria, the court may still allocate it to the Intermediate Track "where it considers it to be in the interests of justice to do so".

Some claim types are expressly excluded:

- Mesothelioma and asbestos lung disease
- Clinical negligence claims unless both breach of duty and causation have been admitted.
- Claims against the police for an intentional or reckless tort or for a HRA remedy (claims against the police resulting from an RTA arising from negligent police driving, an EL claim, and any other claims for an accidental fall on police premises are not excluded.)
- Claims for damages in relation to harm, abuse or neglect of or by children or vulnerable adults.

FOIL presumes that cross-border claims will in practice be outside the extended regime but they are not expressly excluded.

Provisions in the new r.26.13 set out the general issues which should be considered when allocating a claim to the appropriate track, including value, the complexity of the facts, law and evidence, the importance of the claim to non-parties, and the views and circumstances of the parties. In valuing the claim, the court will ignore any amount not in dispute (potentially allowing claims worth significantly more than £100k to be brought within FRC); interest; costs; and any contributory negligence.

Until the new regime beds down attempts are likely to be made to remove certain categories of claim from the new Intermediate Track: it will be important to be vigilant and address applications as they arise.

With the introduction of the Intermediate Track, the value of the claim at the point of allocation will have particular significance. Thorough valuation will be essential, placing importance on the requirement in PD 16 para 4.2:

"The claimant must attach to his particulars of claim a schedule of details of any past and future expenses and losses which he claims."

It should be noted that claims arising from harm, abuse or neglect ***by*** children and vulnerable adults are excluded, echoing the wording in the existing Pre-Action Protocol for Low Value EL/PL Claims. Following the decisions in *Scott v Ministry of Justice* (2019) and *Cameron v Leicester County Council* (2021), there is potential for claims where the child or vulnerable adult has perpetrated the harm to be excluded. Further test litigation on the point is likely.

As a result of draft r.26.9(10), and comments in the note on the new rules published alongside the drafts, it appears that all mesothelioma and asbestos lung disease claims; clinical negligence claims (unless both breach of duty and causation are admitted); and all claims in relation to harm, abuse or neglect of or by children or vulnerable adults will now be allocated to the Multi Track. The note indicates that government proposals for

FRC for clinical negligence claims worth up to £25k are being taken forward by the DHSC with further details to be set out *"in due course*".

Complexity bands

Under r.26.14, when a claim is allocated to the Fast Track or Intermediate Track, the court will assign it to a complexity band, ranging from 1-4. Guidance is provided in r.26.15 and r.26.16 on band allocation in both Tracks, setting out the appropriate band for certain types of claim, and the characteristics which will steer decisions on allocation.

The parties must state in their Directions Questionnaire either the agreed band or, if there is no agreement, the band the party considers appropriate, with relevant information in support. The court will retain discretion to allocate the claim to a different band to that agreed by the parties.

In the Fast Track, RTA claims which fall out of the portal will be Band 2, and all EL/PL claims including those which fall out of the portal will be Band 3. Claims under the Package Travel PAP, which at present are treated as PL claims, recovering FRC under Table 6D, will be Band 2 under the new regime – the same as for RTA claims falling out of the portal.

As non-personal injury RTA claims, Credit Hire will fall into Band 1 on both the Fast Track and the Intermediate Track.

In the Intermediate Track, personal injury claims where liability or quantum is in dispute are appropriate for Band 1. Where both issues are in dispute the claim will be suitable for Band 2. NILH and EL disease claims will fall into Band 3. Band 4 is appropriate for personal injury claims unsuitable for Bands 1-3, including where there are "serious issues of fact or law". Again, opportunistic applications for Band 4 allocation can be expected.

Reallocation

The rules allow for a claim to be reallocated to a different track or to a different band but where directions have been given in respect of a claim on the Intermediate Track, reallocation will only be possible where there are exceptional circumstances, limiting the potential for applications to move claims out of FRC.

FOIL had called for the rules to allow claims to be reallocated from the Multi Track to the Intermediate Track and is pleased to see that will be permitted under r. 26.18.

The court may reassign a claim to a different complexity band where there has been a change in circumstances which justifies reassignment – a loosening of the tight rules on reassignment which the government proposed originally.

The rules will allow claims which, for example, significantly reduce in value as they progress, or partly settle, or in which liability is later admitted, to be reassigned either to a lower track or to a lower band.

Where a claim is reallocated to a different track or a different band, under r.45.14, the costs allowed will be those applicable to the track to which the claim is reallocated, as if that had been the track from the outset. Whilst the new rule will cut both ways depending upon whether the claim is reallocated up or down, with regard to claims moving from one FRC Track to another the provision is simple and certain and avoids more complicated split awards. Issues arise in claims moving from the Intermediate Track to the Multi Track as under r.46.13, on reallocation special costs rules applicable to the first track apply to the date of reallocation, with the rules for the second track applying thereafter.

Part 28 – The Fast Track and Intermediate Track

Dealing with matters of case management from the giving of directions to trial, Part 28 has been extended to cover the Intermediate Track as well as the Fast Track. Under both tracks the court will give directions to fix the trial date and fix a period (not exceeded three weeks) for the trial to take place to be set out in the notice of allocation. To that extent Intermediate Track claims are treated like Fast Track rather that Multi Track claims. The current requirement in r.28(2)(4), that the standard period between the giving of directions and the trial will be no more than 30 weeks, has been removed from the rule but is still in the PD (para 10.1) for Fast Track claims only.

New provisions in Part 28 Section IV, will govern case management of NIHL claims allocated to the Fast Track and all claims allocated to the Intermediate Track.

The rules indicate that in NIHL claims in the Fast Track the court will not normally order a preliminary trial on limitation and any party seeking one must identify that in their Directions Questionnaire: the claims against all other defendants will be stayed until determination of that preliminary issue.

Part 36 – Offers to Settle

Under the new regime, where a defendant's Part 36 offer is accepted within the relevant period, the claimant will be entitled to the FRC (and any additional FRC sums allowed under the rules) for the stage applicable at the date the notice of acceptance was served on the defendant.

Part 36 has been amended to provide that in a claim where the extended FRC regime applies, if the court makes an order which would normally entitle the claimant to indemnity costs, instead, the claimant will be entitled to an additional 35% of the difference between the FRC for:

a. The stage applicable when the relevant period expires; and
b. The stage applicable at the date of judgment.

The claimant will still be entitled to the usual additional interest on costs and the additional 10% damages.

Where the court makes an order entitling the defendant to costs under Part 36, the sums allowed will be the same fixed costs (and any additional FRC) that the claimant would have recovered, less the fixed costs to which the claimant is entitled.

Part 45 – Fixed Costs

Part 45 has been substantially rewritten and there are a number of new Sections:

- Section VI – claims worth up to £25k, outside of or which fall out of the Claims Portal: Package Holiday claims; Disease claims (not including NIHL) and non-PI Fast Track Claims.
- Section VII – claims worth £25k- £100k.
- Section VIII – NIHL claims worth up to £25k.
- Section IX – Disbursements under Sections VI, VII, VIII and for soft tissue injury and whiplash claims.

The Tables of recoverable costs are set out in PD 45:

- Table 12 – FRC in the Fast Track.
- Table 13 – FRC for specialist advice.
- Table 14 – FRC in the Intermediate Track.
- Table 15 – FRC for NIHL claims up to £25k.

More than one claimant

The rules recognise that where the same representative acts for more than one claimant in a claim arising from the same circumstances (for example a driver and passenger in the same vehicle), there is significant overlap in the work undertaken and allowing full FRC for each claimant would be disproportionate.

In r.45.5, for Fast Track and Intermediate Track claims, where a court has so ordered, if a legal representative acts for more than one claimant in the proceedings, each with a separate claim against the defendant, the claimants will be entitled to one set of FRC, with a further 25% of the recoverable costs permitted for each additional claimant.

The court will consider "*whether it is in the interests of justice*" to make an order limiting the costs of an additional claimant when a court is allocating the claim to a track or band (r.26.7(7)).

Defendant's costs

Under r.45.6, where a costs award is made in favour of a defendant, the allowable costs are the FRC set out in Sections VI, VI or VIII and any applicable disbursements under Section IX. For those stages where the FRC are calculated by reference to damages, there are detailed rules to value the claim in circumstances where it is the defendant recovering costs.

Additional costs for specialist advice

Additional sums are allowed in both the Fast Track and the Intermediate Track, for 'specialist legal advice'. In the Fast Track, the sums are set out in Table 13: £1,000 for providing post-issue advice in writing or in conference and £500 for drafting a statement of case.

In the Intermediate Track, the additional sums are included within Table 14, with sums allowed ranging from £2,000 to £3,000, depending upon the band.

Similar proposals were put forward by Lord Justice Jackson and FOIL has raised concerns at the potential for gaming, with additional work undertaken by low grade employees producing 'cut and paste' advice. The rules include some restraints on recovery as set out in r. 45.46 and r.45.50: costs will only be allowed where the legal advice is obtained or the statement of case is drafted by a "*specialist legal representative or the intended trial advocate*". With regard to both, the use of that person must be justified. It is likely that challenge will focus on the need for the advice and the definition of "specialist".

The triggering and part-completion of stages

Table 14, for Intermediate Track claims, sets out 15 separate stages, with FRC applicable for each. R.45.50(2)(c) indicates that the figures for Stages 1,3, 5, 6 and 8 are cumulative costs to be allowed up to and including that stage. The sums in Stages 2,7 and 9 to 15 (additional specialist advice; attendance of a legal representative other than an advocate at trial; trial advocacy; and approval of settlement for a child) are additional costs to be paid if the work is carried out. Additional sums are also payable for trial advocacy and for one mediation or JSM where that takes place.

The figures for Stage 1 (pre-issue to date of service of the defence) are a fixed fee in personal injury claims and a maximum figure subject to assessment for all other claims.

To ascertain whether a stage has been concluded, r.45.50 states that reference to a date set by the court "*means the first date so set, notwithstanding that the parties may agree an extension to a later date, unless the court orders otherwise.*" Although the rule refers to agreed extensions, there is no reference to the position if the court vacates the original hearing and relists. On the literal wording the claim will progress to the next stage at the date of the initial listing even though work in the previous stage is still outstanding. The provision

will become relevant if the claim settles before work in the following stage has been undertaken. The court may be asked in these circumstances to "order otherwise" and satellite litigation is likely in some cases.

The draft rules do not contain any provisions dealing with part-completed stages. Although Lord Justice Jackson floated the idea of some part-payment when a stage is started but not completed, it appears that once work within a stage has commenced the full FRC for that stage will be recoverable. There is the potential here for gaming. Parties will need to pay careful attention to the definition of each stage and where stages begin and end is likely to influence tactical decisions around timings and offers to settle.

The definition of trial

In both the Fast Track and the Intermediate Track, the draft rules define 'trial' as the 'final hearing'.

The definition of 'trial' has already created problems in the existing FRC regime for low value EL/PL claims within the Protocol/Claims Portal. In the current r.45.29E, a trial is defined as the 'final contested hearing'. Issues arose when claims on which liability had been admitted were listed, not for trial, but for a ten-minute disposal hearing to deal with quantum. In *Bird v Acorn* (2016), the Court of Appeal held that a disposal hearing fell within the definition of 'final contested hearing': there was no requirement that the stages should be passed sequentially. The claimant was therefore entitled to recover FRC disproportionate to the work actually undertaken. FOIL has long argued that the *Bird v Acorn* outcome is wrong in principle and distorts the existing FRC regime unfairly.

The wording of the draft rules fails to address the problem (and compounds it as even an uncontested final hearing will now be classed as a trial.) This is a significant issue on which FOIL will continue to lobby: in Table 12 (FRC in the Fast Track), the costs on a claim that is issued and listed for trial are over 80% higher than the costs on a claim which settles before being listed for trial. The problem is more fundamental in the Intermediate Track as a disposal hearing at an early stage does not fit into the sequential framework.

Vulnerable witnesses and parties

Following the MOJ consultation on the extended FRC regime and vulnerability, it will be possible under r.45.10 for a receiving party to apply for additional costs above FRC to reflect vulnerability of a party or witness. Where vulnerability has required additional work to be undertaken and by reason of that work alone "*the claim is for an amount that is at least 20% greater than the amount of fixed recoverable costs*", costs exceeding FRC can be awarded. Those costs may be summarily assessed or subject to detailed assessment.

It is not clear how this provision will work in practise and how the 20% bar is to be established. FOIL has raised concerns at the potential for vulnerability to be raised in a significant number of personal injury claims. Satellite litigation is likely, to clarify the rules.

Under the current FRC regime, it is unclear when and how applications for additional costs for vulnerability should be made. It is sometimes asserted that the applications must be made before the award of costs is made, arguably too early. Conversely, applications are sometimes made by way of a single sentence in the narrative to the bill, arguably too little, too late. Although, with the extended FRC regime, the issue will now arise more frequently, no further clarity is provided in the draft rules, either on the form of the application or on the timing.

Unreasonable behaviour

In a Fast Track or Intermediate Track claim, under r.45.13, where the court considers that a receiving party has behaved unreasonably, the paying party can apply for a reduction of 50% in the FRC payable. Conversely, when it is the paying party whom the court considers has behaved unreasonably the receiving party can apply for a 50% increase. Unreasonable behaviour is defined as "*conduct for which there is no reasonable explanation*."

Disbursements

The issue of recoverable disbursements in a claim subject to FRC has already been considered in relation to the existing regime in *Aldred v Cham* in 2020.The Court of Appeal held that a disbursement for counsel's advice in child claims was not recoverable under CPR 45 Section IIIA (FRC for claims which drop out of the low value protocols/portal) and, *obita dicta*, translation and interpreting fees were not recoverable either.

Under the new regime, although that remains the position for claims within the low value portals, it is disappointing to see that under the draft rules (r.45.59) for Fast Track claims (including those which drop out of the portal), translators' and interpreters' fees are now expressly recoverable, together with "*any disbursement which has been reasonably incurred*", other than a disbursement covering work for which FRC are already allowed.

This change is likely to create gaming, as disbursements are not fixed. Defendants will need to be wary of repeat claims for translation of standard documents and for informal translation services. The concept of 'reasonable disbursements' is likely to result in satellite litigation.

Under r. 45.60 (FRC for Intermediate Track claims) "*the court may allow any disbursement which has been reasonably incurred*", other than a disbursement for work for which costs have already been allowed.

Contracting out of FRC – *Doyle v M&D Foundations and Building Services Limited*

The case of *Doyle* in 2022 was a warning of the care needed in the wording of agreements and consent orders in claims which are subject to FRC.

The case concerned an EL claim in which FRC would usually apply. A consent order was agreed between the parties which provided that the defendant was to pay the claimant's costs "*such costs to be the subject of detailed assessment if not agreed"*. The defendant had not intended that the FRC regime should be displaced, and argued before the Court of Appeal that the wording in the consent order did not indicate that costs were to be assessed on the standard basis. The Court of Appeal disagreed, finding that the phrase, "detailed assessment" referred to an assessment by the procedure in Part 47, and that therefore the usual FRC did not apply.

The problem has been resolved with regard to new claims under the extended regime: under r.45.1(3), where the parties agree a party is entitled to costs, the court will only award FRC "*neither more nor less*." Under the existing FRC regime defendants should continue to be alert to the *Doyle* problem and ensure that unambiguous language is used when settling a claim, to prevent FRC being inadvertently displaced.

No FRC for Part 8 costs-only claims

The draft rules do not implement Lord Justice Jackson's recommendation that FRC should also cover Part 8 costs-only proceedings, which remain outside the new regime. FOIL has lobbied extensively for FRC for this work, arguing that the procedure is eminently suitable for fixed costs, and the failure to introduce them leaves a lacuna between conclusion of the damages claim and assessment of costs which can be exploited to obtain excessive hourly-rate costs.

The Court of Appeal in *Tasleem v Beverley* in 2013 recognised the problem, suggesting that the lacuna warranted consideration by the CPRC. It is disappointing that with the extension of FRC the opportunity has not been taken to fix the costs of this work.

FRC rates

The figures for FRC costs which were set out in the Lord Justice Jackson's 2017 Supplemental Report have been uprated for inflation using the January 2023 Services Producer Price Index (SPPI). This has resulted in a significant uprating of around 20% to the existing FRC for RTA claims which drop out of the portal (now Fast Track band 2) and EL claims which drop out of the portal (now Fast Track band 3), and an even higher uprating for PL claims which fall out.

The MOJ proposes to review the tables of costs and the extended FRC regime more generally in three years' time, as recommended by Lord Justice Jackson. Further detail will follow but the MOJ anticipates uprating by SPPI inflation. Claims already underway will not be affected by the inflationary increases: the same FRC will apply throughout a claim, with costs awarded in accordance with the table of costs in place when the claim is issued.

Transitional arrangements

The new regime will apply to claims where proceedings are issued on or after 1 October 2023, except for personal injury claims where it will apply to claims when the cause of action accrues on or after 1 October 2023. For disease claims the new regime will only apply where the letter of claim has not been sent to the defendant before 1 October 2023.

The provisions create a lacuna in the rules for non-personal injury/non-disease claims which are settled without proceedings at any time after 1 October 2023, where the new regime will not apply and existing costs rules will remain in place (unless an agreement that FRC will apply is included in the settlement).

The Costs SFT will continue to lobby the MOJ and the CPRC on issues arising under the draft rules and once implemented will monitor the implementation of the new regime. If there are issues you would like to raise with FOIL regarding the draft rules, or implementation once the new regime is in place, please contact Shirley Denyer on info@foil.org.uk.

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